



January 21, 2020

VIA ELECTRONIC FILING

The Honorable Jocelyn Boyd
Public Service Commission of South Carolina
101 Executive Center Drive
Columbia, South Carolina 29211

RE: Exploration of a South Carolina Competitive Procurement Program for
the Competitive Procurement of Energy and Capacity from Solar and
Other Renewable Energy Facilities by an Electrical Utility as Allowed
by South Carolina Code Section 58-41-20(E)(2)
Docket No. 2019-365-E

Dear Ms. Boyd:

I am writing on behalf of Dominion Energy South Carolina, Inc. ("DESC") concerning the January 27, 2020 workshop scheduled in the above captioned proceeding by the Public Service Commission of South Carolina ("Commission"). The Commission is authorized to open a generic docket for the purposes of creating programs for the competitive procurement of energy and capacity from renewable energy facilities by an electrical utility within the utility's balancing area if the Commission determines such action to be in the public interest. *See* S.C. Code Ann. § 58-41-20(E)(2). DESC fully supports and appreciates the Commission's desire to advance its understanding of the issues that may arise in implementing the requirements of S.C. Code Ann. § 58-41-20(E)(2). However, for the reasons stated by DESC in Docket No. 2019-226-E and by Duke Energy Carolinas, LLC and Duke Energy Progress, LLC (together, "Duke Energy") in Docket Nos. 2019-224-E and 2019-225-E, DESC is concerned that participation in the January 27, 2020 workshop may put participants and the Commission at risk of non-compliance with the ex parte communication rules set forth in S.C. Code Ann. §§ 58-3-260 *et seq.*

The applicable language of S.C. Code Ann. § 58-3-260(B) states as follows:

Except as otherwise provided herein or unless required for the disposition of ex parte matters specifically authorized by law, a commissioner, hearing officer, or commission employee shall not communicate, directly or indirectly, regarding any issue that is an issue

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in any proceeding or can reasonably be expected to become an issue in any proceeding with any person without notice and opportunity for all parties to participate in the communication, nor shall any person communicate, directly or indirectly, regarding any issue that is an issue in any proceeding or can reasonably be expected to become an issue in any proceeding with any commissioner, hearing officer, or commission employee without notice and opportunity for all parties to participate in the communication.

S.C. Code Ann. § 58-3-260(B).

The workshop scheduled in this docket is intended to allow the Commission to benefit from a discussion of the issues that are likely to be raised in the generic proceeding envisioned under S.C. Code Ann. § 58-41-20(E)(2). While this is a commendable goal, from an *ex parte* communication standpoint it means that the workshop is intended to provide an opportunity for persons to “communicate, directly or indirectly” with “commissioner[s], hearing officer[s] or commission employee[s]” regarding matters that “can reasonably be expected to become an issue in [the] future [evidentiary] proceeding[s]” in this matter. S.C. Code Ann. § 58-3-260(B). The lawfulness of the intended communications will then depend on whether notice and opportunity has been provided “*for all parties* to participate in the communication.” S.C. Code Ann. § 58-3-260(B)(emphasis supplied).

The deadline for persons to intervene in this docket has not been established or publically noticed. Therefore, it is not possible at this point in time to know who the parties to this generic proceeding may be. Moreover, it is not possible to say that notice given to the *participants in the workshop* will be sufficient to ensure notice has been provided to *all parties in the generic proceeding* that important issues pertaining to that proceeding will be discussed with the Commission and its staff.

In this regard, it is worth noting that a workshop is not a proceeding defined by statute or regulation. It does not involve a request for relief. Therefore, it can be neither an application, a complaint, nor a petition as those terms are defined by the Commission’s regulations. S.C. Reg. Ann. §§ 103-823, 103-824, 103-825. A workshop also does not fit within the Administrative Procedures Act definition of a contested case. S.C. Code Ann. §§ 1-23-310 *et seq.* Given the workshop’s uncertain procedural underpinnings, there is risk involved in assuming that holding an *ex parte* discussion in a workshop would be sufficient to insulate participants from challenge under S.C. Code Ann. § 58-3-260(B).

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Furthermore, binding standards and procedures concerning competitive procurement could only be issued through the drafting and approval of regulations by the Commission. See S.C. Code Ann. §§ 1-23-10 *et seq.* Non-binding policy statements could be considered as part of the generic proceeding provided for S.C. Code Ann. § 58-41-20(E)(2). But no provision is made in the statute for a workshop which is not a formal proceeding recognized in Commission practice. As a matter of statutory interpretation: “A statute which provides that a thing shall be done in a certain way carries with it an implied prohibition against doing that thing in any other way. Thus, the method prescribed in a statute for enforcing the rights provided in it is likewise presumed to be exclusive.” Norman J. Singer, *Statutes and Statutory Construction* § 47:23 (7th ed. 2019); accord *Christensen v. Harris Cty.*, 529 U.S. 576, 583 (2000) (“[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode”); *Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) (“[t]he canon of construction *expressio unius est exclusio alterius*’ or *inclusio unius est exclusio alterius*’ holds that to express or include one thing implies the exclusion of another, or of the alternative”) (citations omitted).

In addition, parties have important due process rights and appellate rights that are guaranteed to them in contested case proceedings such as the generic proceedings envisioned by S.C. Code Ann. § 58-41-20(E)(2). See S.C. Code Ann. §§ 1-23-310 *et seq.* and S.C. Code Reg. §§ 103-800 *et seq.* It is not clear that these due process and appellate rights could be adequately protected in the context of a workshop.

For these reasons, DESC is expressing its concern regarding the use of a workshop as part of the process of applying the provisions of S.C. Code Ann. § 58-41-20(E)(2) to future competitive energy procurements. However, as Duke Energy suggests, there is a statutorily defined procedure that specifically allows communications of this sort to take place. This procedure is the allowable *ex parte* communication briefing defined by S.C. Code Ann. § 58-3-260(C)(6). Conducting an allowable *ex parte* communication briefing is the safest and most effective way for the Commission to receive information concerning a party’s viewpoint regarding any future competitive renewable energy procurement program.

Based upon the foregoing and in light of its concerns related to compliance with S.C. Code Ann. § 58-3-260(C), DESC does not intend to participate in the workshop scheduled in Docket No. 2019-365-E. Instead, DESC will contact the Commission Staff to identify a suitable date to schedule such an allowable *ex parte* communication briefing and after that task is accomplished, DESC will submit a formal request for a briefing before the Commission.

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If you have any questions, please advise.

Very truly yours,



K. Chad Burgess

KCB/kms

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